

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

MAY 17 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

JAIME MURIETTA GOMEZ,

Appellant.

)
)
) 2 CA-CR 2006-0285
) DEPARTMENT B
)

MEMORANDUM DECISION

) Not for Publication
)

) Rule 111, Rules of
) the Supreme Court
)
)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20052376

Honorable Frank Dawley, Judge Pro Tempore

AFFIRMED

Isabel G. Garcia, Pima County Legal Defender
By Alex Heveri

Tucson
Attorneys for Appellant

B R A M M E R, Judge.

¶1 After a jury trial in May 2006, appellant Jaime Murietta Gomez was convicted of aggravated driving while an illegal drug or its metabolite was present in his body and while his license was suspended or revoked, a class four felony in violation of A.R.S. § 28-1383(A)(1). After finding Gomez had one historical prior felony conviction, the trial court sentenced him to a presumptive term of 4.5 years' imprisonment.

¶2 Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). She identifies arguable issues for our consideration and asks us, in addition, to search the record for error. Gomez has not filed a supplemental brief.

¶3 Pursuant to our obligation under *Anders*, we have reviewed the entire record. We are satisfied that reasonable evidence established all the elements of § 28-1383(A)(1) necessary to support Gomez’s conviction, including his prerequisite violation of A.R.S. § 28-1381(A)(3). Under the relevant provisions of § 28-1383(A)(1), a person commits aggravated driving if the person violates § 28-1381 while his or her driver’s license is suspended, canceled, revoked, or refused. A person violates § 28-1381(A)(3) if he or she drives or is in actual physical control of a vehicle while “any drug defined in section 13-3401 or its metabolite” is in the person’s body. The state presented evidence Gomez had driven a vehicle while metabolites of both cocaine and marijuana were in his body. The parties stipulated that Gomez’s driver’s license had been revoked at the time of this offense.

¶4 As counsel acknowledges, the first two of the arguable issues raised—whether § 28-1381(A)(3) is unconstitutionally vague or overbroad—have been previously addressed in Arizona. In *State v. Phillips*, 178 Ariz. 368, 371, 873 P.2d 706, 709 (App. 1994), Division One of this court found A.R.S. § 28-692(A)(3)—subsequently renumbered as § 28-1381(A)(3)—was not unconstitutionally vague. Nothing in the version of the statute that applies to Gomez causes us to depart from the conclusion reached in *Phillips*.

¶5 We conclude that, like the defendant in *Phillips*, Gomez lacks standing to challenge the statute as overbroad. *See* 178 Ariz. at 371, 873 P.2d at 709. A statute is

overbroad if it punishes not only the permissibly regulated conduct it is designed to address, but also conduct that is constitutionally protected. *See State v. Brown*, 207 Ariz. 231, ¶ 16, 85 P.3d 109, 115 (App. 2004). However, unless a statute regulates the exercise of First Amendment rights under the United States Constitution, something § 28-1381(A)(3) does not do, a defendant accused of the permissibly regulated and unprotected conduct may not challenge the statute’s constitutionality on the ground it may apply to other “‘innocent’ defendants” who are not before the court. *State v. Martin*, 174 Ariz. 118, 123, 847 P.2d 619, 624 (App. 1992); *see also Cacavas v. Bowen*, 168 Ariz. 114, 117, 811 P.2d 366, 369 (App. 1991).

¶6 Lastly, Gomez suggests as an arguable issue that his 4.5-year sentence is excessive and quotes the trial court’s findings to that effect pursuant to A.R.S. § 13-603(L).¹ We understand Gomez’s argument to allege his sentence violates the Eighth Amendment to the United States Constitution’s ban on “cruel and unusual punishments.” In evaluating such a claim, the court first looks to see whether, considering the facts and circumstances of the offense, the sentence raises an inference of gross disproportionality to the crime. *State v. Davis*, 206 Ariz. 377, ¶ 34, 79 P.3d 64, 71 (2003).

¶7 No such inference arises here. The record shows that Gomez, who had previously been convicted of aggravated driving under the influence of an intoxicant (DUI) with a person under fifteen years of age in the vehicle, drove a walkable distance on a

¹Section 13-603(L) permits the trial court to enter an order allowing a person sentenced to petition the board of executive clemency for a commutation of sentence if the court is of the opinion that a sentence the court is legally required to impose is clearly excessive.

revoked license from a convenience store to his girlfriend's house. He did so in a vehicle that caught the attention of police because it was not the same vehicle to which the attached license plate had been assigned. The resulting traffic stop led, ultimately, to the detection of the metabolites of two illegal drugs in his body. The apparent purpose of his trip to the convenience store had been to procure beer. The foregoing facts alone exposed him to a minimum of three years and a maximum of six years in prison. He does not suggest that the minimum term would have been excessive, nor do any of the trial court's comments suggest it thought so. However, because Gomez had been on probation for the prior aggravated DUI at the time of this offense, the court was required by A.R.S. § 13-604.02(B) to impose no less than the presumptive term of 4.5 years at issue here. Notwithstanding the trial court's comments, these facts are not so provocative in relation to Gomez's sentence that it "shocks the moral sense of the court and community" to uphold the otherwise legal sentence. *Davis*, 206 Ariz. 377, ¶ 49, 79 P.3d at 75. In addition, our review of the pretrial and sentencing proceedings has shown the presence of no fundamental and prejudicial errors.

¶8 We affirm Gomez's conviction and sentence.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge